No. 22–393

In the Supreme Court of the United States

NETCHOICE, LLC, D.B.A. NETCHOICE, ET AL.,
Cross-Petitioners,
v.
ATTORNEY GENERAL, STATE OF FLORIDA, ET AL.
Cross-Respondents.

On Conditional Cross-Petition for a Writ
of Certiorari to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF FORMER U.S. REPRESENTATIVE CHRISTOPHER COX, CO-AUTHOR OF SECTION 230, AS *AMICUS CURIAE* IN SUPPORT OF CONDITIONAL CROSS-PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Christopher Cox is a former United States Representative (R-CA) who, along with then-United States Representative (now Senator) Ron Wyden (D-OR), authored Section 230 of the Communications Decency Act, 47 U.S.C. §230 (hereinafter, "Section 230"). Since the statute's enactment, Mr. Cox has been a leading observer of developments in the case law and, at the request of the House and Senate, a contributor to recent congressional deliberations about Section 230.

In this case, the district court's preliminary injunction of certain provisions of Florida's Senate Bill 7072 (the "Act") relied principally upon the First Amendment. At the same time, the court found that Section 230 likely preempted some of those provisions. On appeal, the Eleventh Circuit relied entirely on the First Amendment to uphold the injunction as to important parts of the Act — but also rejected the First Amendment claims against other parts of the Act that are the subject of NetChoice's conditional cross-petition. While this case is therefore primarily about the First Amendment, it also raises issues about the relationship of the First Amendment and

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[1] No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Christopher Cox or his counsel made a monetary contribution to the brief's preparation or submission. The parties have filed blanket consent waivers with the Court on November 3, 2022, and November 8, 2022, consenting to the filing of all *amicus* briefs. Prior to the filing of this brief, the undersigned counsel notified counsel of record for all parties of the intent to file this brief.

Section 230. These issues are important to legislators, both Federal and State, who are contemplating new statutory regulation of the Internet. These issues are equally important to the *millions* of U.S.-based websites on which content moderation is protected by both the First Amendment and Section 230. While the Act applies only to a defined category of Internet platforms (herein, "the platforms"), it is important to remember that both the First Amendment and Section 230 apply to *all* websites.

This Court's guidance is especially needed on the questions raised in both the petition and the cross-petition because of dramatically conflicting analyses of these issues by the Eleventh Circuit in this case, and the Fifth Circuit in a case regarding Texas's similar law.[2] A fundamental difference between the circuits is whether Congress, by enacting Section 230, deprived websites of First Amendment protection that would otherwise apply to the discretion they exercise with respect to user-created content.

Amicus is able to speak authoritatively to the history of the law and Congress's intent in passing it. This history is relevant not because it should alter in any way what the Court considers to be the plain meaning of the statutory text. Rather, it demonstrates that the plain meaning of the words in Section 230 is exactly what Congress intended — contrary to the arguments of those who would embellish and distort it to achieve their desired outcomes.

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[2] *See NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022).

SUMMARY OF ARGUMENT

Granting Florida's petition and NetChoice's cross-petition will allow the Court to consider the entirety of the Act and provide critical guidance to Congress, the States, and millions of Internet websites that publish and moderate user-created content on how the First Amendment applies to them.

Section 230 originated as free-standing legislation independent of the Communications Decency Act. It expressly rejected the approach of the CDA, which was punitive, heavily regulatory, government-directed, and violative of the First Amendment. Section 230 established clear rules of liability tailored to the essential characteristics of the Internet in order to expand opportunities for users to create and publish their own content. At the same time, by designating the websites themselves rather than the government as arbiters of content moderation and community standards, Section 230 encouraged the development of a variety of websites catering to a broad range of interests, each with its own community standards, without inviting the abuse of the First Amendment that government speech policing would entail.

The Act under review in this case, and the Texas law considered by the Fifth Circuit, both take a very different approach. Both raise serious First Amendment issues by making the State, rather than the platforms, the arbiter of what user-created content is objectionable and what is not. The Eleventh Circuit addressed these issues head-on, holding that the Act violates the First Amendment in a number of respects, but rejecting other First Amendment claims

against the Act. The Fifth Circuit, on the other hand, contended that Section 230 deprives websites of First Amendment protection. This is not how the statute operates. Congress passed Section 230 to protect websites from derivative liability for moderating user content, which is their First Amendment right — not to take that right away. Moreover, the suggestion that Congress *could* take away First Amendment rights even if it so intended is antithetical to our constitutional system. This Court should grant review to reinforce its First Amendment jurisprudence as it applies to the Internet.

ARGUMENT

Granting certiorari on both the petition and cross-petition would greatly benefit Federal and State legislators considering new regulations on the Internet. It would equally assist the millions of U.S.-based websites that publish and moderate user-created content. At present, although they are not parties to either this case or the Texas case, websites of all kinds — for-profit, nonprofit, large, small, academic or entertaining, scientific, or political — are forced to rely on the guidance provided by the conflicting decisions in the Fifth and Eleventh Circuits concerning their rights to moderate content and their potential liability in connection therewith.

The Florida law under review, as succinctly summarized in the Governor's signing statement, prohibits the "biased silencing" of "our freedom of speech as conservatives" by "the 'big tech' oligarchs in

Silicon Valley."[3] In other words, it imposes a statutory test of "bias," to be interpreted and enforced by the executive branch of the State government. This legislative approach is similar to that advanced in 1995 by the author of the Communications Decency Act, Senator James Exon (D-NE).

Senator Exon's bill was enacted into law at the same time as the federal law that today wears the prosaic label "Section 230." Section 230 was written to *defeat* the Exon bill and its model of government regulation of speech. Originally named the Internet Freedom and Family Empowerment Act, H.R. 1978, it expressly stated its purpose to abjure government regulation of speech on the Internet. Instead, Internet users could select the online communities they were most comfortable with. Those communities would be able to moderate content according to their tastes, and they would be protected from liability for exercising that judgment. H.R. 1978, passed by the House of Representatives as a free-standing bill, was subsequently passed again in substantially similar form in both the House and the Senate as part of the Telecommunications Act of 1996.

Though Section 230 was meant as a substitute for the Exon bill, the House-Senate conference committee included both bills in the final legislation. Ironically, the Cox-Wyden bill became a section of the

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[3] Pet.App.7a (quoting *News Release: Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech* (May 24, 2021)), *available at* https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech/. All Pet.App. cites are to the appendix to Florida's petition in No. 22-277.

Communications Decency Act that it was meant to supplant.[4]

One year after the Telecommunications Act was signed into law, this Court ruled that essentially all of Senator Exon's CDA violated the First Amendment. *Reno v. Am. C.L. Union*, 521 U.S. 844 (1997).

The First Amendment problems with the CDA were apparent to many in Congress throughout the debates on these bills in 1995 and 1996. Section 230, in contrast, complemented rather than challenged the First Amendment. By assigning to websites rather than the government the role of speech police, it spoke loudly against the notion that government actors should be involved in determining what Americans are allowed to read and write. Recognizing that there will always be disputes about what content websites choose to display, Section 230 leaves it to Internet users to decide which, if any, websites they will patronize.

The First Amendment concerns that led Congress to pass Section 230 are directly relevant to the First Amendment issues raised by the Act that have been identified in the petition and cross-petition. The parties' competing arguments about the First Amendment's application to content moderation, moreover, draw on their very different interpretations of Section 230.

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[4] For a complete account of the circumstances that led to Section 230's passage, *see* Christopher Cox, *The Origins and Original Intent of Section 230 of the Communications Decency Act*, RICHMOND J. OF L. & TECH. (Aug. 27, 2020), *available at* https://jolt.richmond.edu/2020/08/27/the-origins-and-original-intent-of-section-230-of-the-communications-decency-act/.

This brief examines these differences. It proceeds in two parts. The first describes the genesis of Section 230 in response to threats to First Amendment freedoms from the CDA's approach of government speech policing. The second discusses the argument advanced by Texas in the Fifth Circuit that Section 230 *deprives* websites of their First Amendment right to moderate user content, explaining that such an interpretation stands the statute on its head.

A. Section 230 expressly rejected the competing alternative of government-regulated speech, which violated the First Amendment

Senator Exon's CDA and Section 230 represented two dramatically different legislative approaches to governmental regulation of speech on the Internet.[5]

The CDA as originally introduced authorized the Federal Communications Commission to adopt and enforce regulations that would limit what adults could access, say, or write online. Anyone who posted any "indecent" communication, including any "comment, request, suggestion, proposal, [or] image" that was viewable by "any person under 18 years of age" would become criminally liable, facing both jail and fines.[6]

Not only would the content creator — the person who posted the article or image that was unsuitable for minors — face jail and fines, but the bill made the

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[5] *See generally* Cox, *supra* n. 4.

[6] 104th Cong., 1st Sess., 141 Cong. Rec. Pt. 11, 16007–8 (June 14, 1995) (remarks of Sen. Exon).

mere transmission of such content criminal as well.[7] Meanwhile, Internet service providers would be exempted from civil or criminal liability for the limited purpose of eavesdropping on customer email in order to prevent the transmission of potentially offensive material.

On the other hand, the Cox-Wyden bill — H.R. 1978, subsequently enacted as Section 230 — was explicitly designed as an alternative to Exon's proposal. Its purpose was to protect both user-created speech and websites' enforcement of their community standards from government regulation.[8]

Creators of illegal content would not be let off the hook; they would be liable for compliance with all laws, both civil and criminal, in connection with any content they created. But to avoid interfering with the essential functioning of the Internet, the law would not shift responsibility for that content to websites hosting it, for whom the imposition of legal responsibility for real-time screening of a constant flow of digital messages, documents, images, and sounds would be unreasonable. Instead, Internet platforms would be allowed to act as "Good Samaritans" by reviewing at least some of the content if they chose to do so in the course of enforcing rules against content that they or their users considered objectionable.

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[7] Communications Decency Act, §2, S. 314, 104th Cong., 1st Sess. (February 2, 1995).

[8] *See* Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong., 1st Sess. (June 30, 1995).

In contrast with Senator Exon's approach, which was punitive, heavily regulatory, and government-directed, Section 230 focused on enabling user-created content by providing clear rules of legal liability for website operators that host it. A website that is not involved in content creation would be protected from liability for content created by third-party users. To encourage content moderation suited to each website's community standards, the law specifically places the determination of what is objectionable in the hands of each website and its users.

Creating a legal environment hospitable to user-created content required that Congress strike the right balance between opportunity and responsibility. Section 230 is such a balance — holding creators of illegal content liable, while protecting websites that host content created entirely by others.

Most important to understanding the operation of Section 230 is that it does *not* protect platforms from liability when they are complicit — even if only in part — in the creation or development of illegal content.

This explicit statutory allocation of responsibility and liability was necessary because of certain differences between the Internet and the communications technologies of print, radio, and television that preceded it. The Internet was like these media in some ways, but not in others. A significant difference was that newspapers and magazines originated from one source, which controlled all of the content, and were distributed to thousands of passive readers. Broadcast television had long consisted of three networks; and even with the advent of cable, the content sources were

relatively few. As with newspapers and magazines, the millions of viewers were passive. The same was true of radio.

The opposite was true on the Internet. Content published from a single website could be the creation of its millions of readers, viewers, and listeners. On this medium, the number of content creators could be nearly the same as the number of users. In the 1990s, Internet usage was already measured in the millions, and the exponential rates of growth at the time made it clear it would soon expand from hundreds of millions to billions.

Another characteristic that distinguished the Internet was that communications among these millions of users were instantaneous: the content creators could interact with the entire planet without intermediation or any lag time. In order for Senator Exon's government censors to intervene, they would have to destroy this real-time feature of the technology that made it so useful.

Section 230 was therefore based on these essential differentiating characteristics of the Internet. When a single user post could threaten a website hosting it with millions of dollars in damages, it was clear that websites would not wish to bear the risks of hosting content created by millions of users without protection from liability. Otherwise, they would be exposed to lawsuits for everything their users posted. In 21st century terms, this would mean that Yelp would be exposed to lawsuits for its users' negative comments about restaurants, and Trip Advisor could be sued for a user's disparaging review of a hotel. The nonprofit

Wikipedia, comprised entirely of user-created content, would simply not exist.

It was for these reasons that Congress established Section 230's liability protections. To summarize their specific operation: when a website publishes user-created content, the content remains the responsibility of the creator. *See* 47 U.S.C. §230(c)(1). But a website is not protected if it is responsible, even in part, for creating its own content or developing others' content. *See id.* §230(f)(3). Content moderation was to be encouraged, but Congress realized it would be unreasonable for the law to make websites responsible for the massive amounts of data posted by millions of people all day, every day. To ensure that websites would not face liability for imperfect content moderation efforts, they are protected from liability when they restrict access to material that they or their users consider objectionable. *See id.* §230(c)(2)(A). The statute very clearly places responsibility for determining what is objectionable within the "good faith" discretion of the website. *Id.* It may not be second-guessed by the government or civil litigants.

Despite the opposing policies represented by Section 230 and the CDA, the legislative process led to their both being included in the sweeping Telecommunications Act.[9] This was because the Senate had already passed the CDA before the House passed the Cox-Wyden bill, later designated as Section 230. But almost before the ink was dry on the Telecommunications Act that included them both, the CDA faced legal challenges. The following summer,

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[9] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

this Court invalidated most of the CDA in a unanimous opinion. *See Reno*, 521 U.S. 844.

The Act under review in this case, and the Texas law considered by the Fifth Circuit, both follow the Exon model of government speech regulation rather than the policy underlying Section 230 to keep the Internet free of government speech regulation. Both the Florida and Texas enactments raise serious First Amendment issues by making the State, rather than the platforms, the arbiter of what user-created content is objectionable and what is not. This Court's review of the petition and cross-petition will be essential to make clear, to legislators and to websites hosting user-created content, how the First Amendment operates in this area.

B. The Act's approach of government-regulated speech is not consistent with the First Amendment

The Florida law at issue in this case reflects goals that are inimical to the First Amendment. The Act's approach is to outlaw political bias on the platforms and make the State the arbiter of what constitutes bias.

When websites, including the platforms, moderate content, it is not Section 230 but the First Amendment that empowers them to do so. Section 230 complements the First Amendment rights of websites by ensuring that they are not overwhelmed with lawsuits that cannot be dismissed at the pleading stage, leading to years of litigation in every case. By eschewing tests of liability based on knowledge or state of mind, the law enables judges to make a more

objective assessment on the basis of allegations as they are pleaded.

The First Amendment, as this Court has observed, "prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Acad. & Institutional Rights,* 547 U.S. 47, 61 (2006). This case offers the Court the opportunity to make clear that statutes such as the Act plainly violate this principle. The First Amendment protects the good faith exercise of editorial control and judgment through content moderation standards. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). Government attempts to compel private entities to disseminate messages they do not agree with conflict with this Court's First Amendment jurisprudence establishing that "a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573 (1995).

The Eleventh Circuit correctly applied these principles to the "same sort of editorial judgments" that the platforms exercise when they curate user content. Pet.App.23a-24a (citing, *inter alia*, *Tornillo*). When the platforms curate content for users' feeds, they make "a judgment rooted in the platform's own views about the sorts of content and viewpoints that are valuable and appropriate for dissemination on its site." Pet.App.19a. The Eleventh Circuit correctly held that platforms' content-moderation practices "fit comfortably within the Supreme Court's editorial-judgment precedents." Pet.App.28a.

Because in many ways Section 230 reinforces these free-speech values, the district court held that portions of the Act, including its prohibition on de-

platforming candidates, are "inconsistent" with Section 230 and therefore preempted. Pet.App.80a-82a. This Court should grant certiorari to confirm that the Act violates the First Amendment in numerous other respects as well.

Given the role Section 230 plays in protecting First Amendment freedoms, it is ironic that advocates of the Florida and Texas laws have cited Section 230 as reason to uphold those laws' restrictions on expression. The Fifth Circuit, in the Texas case, went so far as to suggest that in Section 230, Congress impliedly repealed the platforms' First Amendment rights. *See Paxton*, 49 F.4th at 465–69. Beyond the obvious fact that Section 230 was expressly designed to promote both user speech and the platforms' speech as expressed in content moderation, it should go without saying that Congress has no power to deprive anyone of their First Amendment rights. This Court should grant certiorari to clarify that Section 230 did not have, and could not possibly have, that effect.

As the structure of Section 230 itself recognizes, the First Amendment does not allow the government to require websites to be politically neutral. That would produce absurd results, such as requiring that the Democratic National Committee or the Republican National Committee post on their websites the statements of politicians with whom they disagree. The First Amendment declares that governments shall make "no law" abridging the right of every one of the millions of websites in the United States to make their own expressive choices concerning what content they will host.

In the Fifth Circuit's view, Section 230 stripped websites of their First Amendment rights by supposedly characterizing them as mere "conduits" of speech made by others. *Paxton*, 49 F.4th at 468. That is literally the opposite of what Section 230 does. Section 230 was enacted to *reverse* the holdings in two New York court decisions that required websites to be "mere conduits" in order to avoid liability for user-created content.[10] Beyond providing limited protection from liability for illegal content created wholly by others, *see* 47 U.S.C. §230(c)(1), Section 230 expressly protects the ability of websites including the platforms to make expressive choices of their own by engaging in content moderation, *id.* §230(c)(2)(A).

In this respect, the Fifth Circuit fundamentally misconstrued Section 230's language. The plain language of the statute does not say what the Fifth Circuit imagines it means. It is nothing less than rewriting the statute to contend that words with an opposite meaning somehow "reflect[]," as the Fifth Circuit surmised, "Congress's judgment that the Platforms do not operate like traditional publishers and are not 'speak[ing]' when they host user-submitted content." *Paxton*, 49 F.4th at 465 (quoting 47 U.S.C. §230(c)(1)).

Section 230 says neither of those things. It makes no judgment about whether a website is operating like a traditional publisher. It describes the circumstances in which a website will not be *treated* as a publisher of

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[10] *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995); *Cubby, Inc. v. CompuServe, Inc.*, 776 F.Supp. 135 (S.D.N.Y. 1991).

content *created wholly by others*. *See* 47 U.S.C. §230(c)(1). It most assuredly does *not* state that a website hosting user content is not "speaking" by choosing when and whether to host user content. Those choices are expressive of the website's own policies. They do not constitute content created wholly by others, but rather speech of the website itself.

Ultimately, this case is about the First Amendment. By granting plenary review of all the questions this matter presents, this Court can make clear for legislators and millions of websites that the First Amendment, complemented by Section 230, protects websites' ability to moderate user content. A clear statement of constitutional law in this area will equally benefit the millions of people whose opportunity to publish their creations online depends upon websites' First Amendment rights to moderate the content they host.

CONCLUSION

This Court should grant the conditional cross petition for a writ of certiorari.

Respectfully submitted,

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